INTERIOR BOARD OF INDIAN APPEALS

Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director,
Bureau of Indian Affairs

25 IBIA 236 (03/16/1994)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
v.
MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-101-A Decided March 16, 1994

Appeal from a decision concerning division of program funds among Michigan tribes.

Affirmed.

1. Appropriations--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

   A Bureau of Indian Affairs decision distributing program funds among several tribes is a decision based on the exercise of discretion. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Administrative Procedure: Burden of Proof--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

   When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official, the appellant bears the burden of showing that the official did not properly exercise discretion.

APPEARANCES: James M. Jannetta, Esq., Sault Ste. Marie, Michigan, for appellant; Jean W. Sutton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director; Kathryn L. Tierney, Esq., Brimley, Michigan, for the Bay Mills Indian Community and the Saginaw Chippewa Tribe; Joseph O'Leary, Esq., Baraga, Michigan, for the Keweenaw Bay Indian Community; Dawn Duncan, Esq., Wilson, Michigan, for the Hannahville Indian Community; and John Petoskey, Esq., Suttons Bay, Michigan, for the Grand Traverse Band of Ottawa and Chippewa Indians.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Sault Ste. Marie Tribe of Chippewa Indians seeks review of an April 30, 1993, decision of the Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the division of a FY 1993 special

appropriation for Michigan tribes. For the reasons discussed below, the Board affirms the Area Director's decision.

At the time Congress was considering FY 1992 appropriations for BIA, six of the seven Federally recognized Michigan tribes 1/ began efforts to obtain specially earmarked funds to correct what they described as the historical underfunding of tribes in Michigan. The tribes made their presentation directly to Congress rather than through BIA's appropriation request. For FY 1992, they sought funding in the amount of $11,501,000 over and above the amount sought by BIA for the Michigan tribes. Congress responded to the tribes' request, but only in the amount of $500,000. By unanimous agreement of the tribes, this additional funding for FY 1992 was divided equally among them, after reimbursement of certain expenses to the tribes which had incurred them.

For FY 1993, the Michigan tribes again sought add-on funding from Congress, this time in the amount of $8,118,000. 2/ Again, a special appropriation was made for them in the amount of $500,000. After the Gramm-Rudman deduction, the special appropriation for FY 1993 totalled $495,748.

On December 2, 1992, the Executive Board of the Inter-Tribal Council of Michigan voted 6-1 to divide the funds in the same manner as in FY 1992, i.e., equally among the tribes after reimbursement of certain expenses to some of the tribes. 3/ By letter of the same date, the Council asked the Superintendent, Michigan Agency, BIA, to distribute the funds in accordance with its vote. On December 7, 1992, appellant, which had cast the opposing vote at the Council meeting, wrote to the Superintendent, requesting that

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1/ These were, in addition to appellant, the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Hannahville Indian Community, the Keweenaw Bay Indian Community, and the Saginaw Chippewa Tribe. The seventh Michigan tribe, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, is presently funded under BIA's "new tribes" appropriation and therefore did not join in the other tribes' effort to secure additional funding.

2/ BIA's appropriation request for the Michigan Agency and the Michigan tribes for FY 1993 was $4,382,560. The tribes sought to add $8,118,000 to that amount for a total of $12,500,560.

3/ The Executive Board of the Inter-Tribal Council consists of the chairpersons of all the Michigan tribes.

Under the distribution formula requested by the Inter-Tribal Council, the tribes would each receive $75,958. In addition, the Bay Mills Indian Community, the Saginaw Chippewa Tribe, and the Hannahville Indian Community would receive additional amounts in reimbursement for expenses.

Although the vote tally reported by the Council, 6-1, suggests that the Lac Vieux Desert Band participated in the vote, other statements in the record indicate that the Band abstained. The Board finds that, for purposes of the issue in this appeal, this apparent discrepancy is of no consequence.

she "distribute [the funds] based on the official testimony presented to Congress." Appellant's letter continued:

> The congressional testimony presented by [the Chairman of the Inter-Tribal Council] states "If awarded, these funds will be divided equitably among the six tribes commensurate with the needs assessment prepared by that Tribe and our local BIA staff." Based on this testimony and the needs assessment compiled for this testimony the Sault Tribe should receive $126,100 [4/] as its equitable share.

The Superintendent sent copies of appellant's letter to the other tribes and requested each to submit a brief summary explaining the rationale for the Inter-Tribal Council's decision concerning division of the funds. Four of the five tribes responded. All reaffirmed their support for the decision to divide the funds equally. All agreed that, had full funding been received, allocation to the tribes should be made according to need but that, given the small amount appropriated, equal division among the tribes was the fairest way to distribute the funds.

On December 18, 1992, the Superintendent advised appellant that the funds would be divided in accordance with the request of the Inter-Tribal Council. She further stated:

> Our decision was based on the following considerations:
>
> A. The Congressional testimony by [the Chairman of the Inter-Tribal Council] was in relation to a distribution based on full funding for the tribes. It does not appear to prohibit an alternative plan if other than full funding were achieved.
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> B. The distribution as voted by the Inter-Tribal Executive Council proposes a plan which is not unreasonable. It is based on a similar division of the FY 1992 funds which provides for an equal distribution after a deduction for legal expenses and travel.
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> C. The plan was supported by a majority vote with five of the seven member tribes in support. The Lac Vieux Desert Band abstained because they were not a party to the request.
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> D. There would be no clear harm to the Sault Ste. Marie Tribe if the funds were distributed based on the Executive Council vote.

Appellant appealed the Superintendent's decision to the Area Director, who affirmed it on April 30, 1993. 5/

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4/ Appellant later revised this figure to $116,463.

5/ While the appeal was pending before him, the Area Director approved partial distribution of the funds, reserving enough to cover the amount claimed by appellant.

Appellant's notice of appeal from the Area Director's decision was received by the Board on June 22, 1993, by transmittal from the Area Director. 6/ Briefs were filed by appellant; the Area Director; and the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Hannahville Indian Community, the Keweenaw Bay Indian Community, and the Saginaw Chippewa Tribe (respondent tribes).

Discussion and Conclusions

[1] As appellant recognizes, a BIA decision concerning the division of program funds among tribes is a decision based on the exercise of discretion. E.g., Ponca Tribe v. Acting Anadarko Area Director, 22 IBIA 199 (1992). Appellant correctly states the Board's standard of review for such decisions: In reviewing a discretionary decision of a BIA official, the Board does not substitute its judgment for that of BIA but, instead, reviews the matter to determine whether proper consideration was given to all legal prerequisites to the exercise of discretion. Id. 7/

Appellant contends that BIA committed legal error here by violating its trust responsibility toward appellant. It was a breach of trust, appellant argues, for BIA to divide the funds equally among the six tribes, rather than in accordance with each tribe's need.

The Michigan tribes' request to Congress, entitled "Michigan Tribes Equity Funding Request," indicates that each tribe prepared its own needs assessment with the assistance of BIA staff. It is not clear from the request what factors the tribes used to arrive at their assessments. Nor is it clear that each tribe used the same factors. Appellant focuses here upon the factors of tribal enrollment and service population and suggests that it believes these are the only relevant factors. In this regard, it states: "THE SAULT TRIBE HAS OVER TWICE AS MANY MEMBERS, AND OVER TWICE THE SERVICE AREA POPULATION, AS ALL OF THE OTHER SIX MICHIGAN TRIBES PUT TOGETHER" (Appellant's Brief at 11 (capitals in original)). The Board assumes for purposes of this decision that appellant's claim of entitlement to a larger share of the special appropriation is based upon its enrollment and/or its service population. 8/ It appears, therefore, that

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6/ The Area Director incorrectly advised appellant to file its notice of appeal with the Assistant Secretary - Indian Affairs, rather than the Board. Because of the incorrect appeal information given in the Area Director's decision, the notice of appeal, even though apparently untimely, was accepted as timely by the Board. See 25 CFR 2.13(c).

7/ Cf. Lincoln v. Vigil, 508 U.S. 182, 113 S. Ct. 2024 (1993), holding that an agency's allocation of funds from a lump-sum appropriation is "committed to agency discretion by law" and therefore not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1988).

8/ The Area Director interpreted appellant's claim for additional funding as based solely upon tribal enrollment. See Area Director's Apr. 30, 1993, decision at 2: "The Sault Tribe bases its claim on arguments which assume that tribal needs are mathematically proportionate to numbers of enrolled members." The brief filed in this appeal by the respondent tribes describes

appellant's allegation of breach of trust is based upon the premise that BIA has a trust obligation to allocate program funding among tribes based upon tribal membership or service population. Appellant does not cite any authority for this proposition, and the Board is not aware of any.

The Board has recognized that, in allocating funds among tribes, BIA may take factors other that membership/service population into account. See Ponca Tribe for an example of an allocation formula based upon a number of factors, which vary from program to program. The Board has also recognized that BIA must have the leeway to balance various factors in order to arrive at the best possible funding decisions, particularly where funds are limited. E.g., Kaw Nation v. Anadarko Area Director, 24 IBIA 21 (1993). This leeway is an essential attribute of BIA's discretionary authority over funding decisions of this nature. The Board declines to hold that BIA has a trust obligation to divide program funds among tribes based solely on membership or service population. 9/

Appellant also contends that the Superintendent abused her discretion and abdicated her decisionmaking role by "rubber-stamping" the decision of the Inter-Tribal Council.

BIA encourages tribes to reach agreements among themselves with respect to the division of program funds. 10/ Where funds have been appropriated

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fn. 8 (continued)
appellant's position as based upon its service population (Respondent Tribes' Brief at 10-11). Appellant has not objected to the interpretation of its position by the Area Director or the respondent tribes.

Appellant received Federal recognition in 1974 and had a voting population of 1,331 in 1975, when it adopted its constitution. Appellant states that its enrollment is now over 22,000 (Appellant's Brief at 11 n.8). It is apparent that the present conflict between appellant and the respondent tribes is based in part upon appellant's expanding enrollment. See Respondent Tribes' Brief at 12-19.

9/ In Lincoln v. Vigil, the Supreme Court rejected the notion that the trust responsibility limited the discretion of the Indian Health Service to reallocate program funds under the facts of that case. The Court cited, inter alia, Quick Bear v. Leupp, 210 U.S. 50, 80 (1908), noting that that case "distinguish[ed] between money appropriated to fulfill treaty obligations, to which trust relationship attaches, and 'gratuitous appropriations.'" 113 S. Ct. at 2033.

10/ BIA's policy in this regard is evident in the proposed regulations for contracting under the Indian Self-Determination Act, 59 FR 3166 (Jan. 20, 1994). See, e.g., proposed 25 CFR 900.107(a), 59 FR at 3182, concerning program division:

"It is the Secretary's policy to encourage all tribes affected by a proposed program division to confer and resolve among themselves the division of program resources, including funds, facilities, equipment, and personnel. A tribe or tribal organization intending to submit a contract proposal is encouraged to commence that inter-tribal consultation process as early as possible, and preferably before submitting the proposal to the

solely through the tribes' efforts, it seems particularly appropriate that BIA should distribute the funds in accordance with their wishes. In this case, because the tribes were not unanimous, the Superintendent could not simply accede to the tribes' decision but was required to review the matter and render her own decision. The Superintendent's decision here shows that, contrary to appellant's allegation, she made an independent judgment concerning the Inter-Tribal Council's request. Further, she gave reasons to support that judgment. 11/ The Board finds that the Superintendent did not merely "rubber-stamp" the Inter-Tribal Council's decision.

Next, appellant contends that equal division of the funds is in violation of the intent of Congress and perpetuates the inequality in funding which the additional funding was intended to ameliorate. This argument is apparently based upon the statement in the tribes' request to Congress that, "[i]f awarded, these funds will be divided equitably among the six tribes commensurate with the needs assessment prepared by that Tribe and our local BIA staff" (Tribes' Request at unnumbered page 6). Appellant and the respondent tribes agree that, had full funding been received, they would have divided, or urged BIA to divide, the funds in accordance with the needs assessments. The respondent tribes contend, however, that they committed themselves to divide the funds in this manner only in the event full funding was received. They further contend that they advised Congress in their testimony for FY 1993 that the FY 1992 appropriation of $500,000 had been divided equally among the tribes.

Appellant cites no provision of the appropriations act or its legislative history which addresses the division of the special funds among the Michigan tribes. The report of the Conference Committee states only, with respect to this particular appropriation: "Within special distributions, there is $500,000 for an increase to the base for the Michigan tribes." H.R. Rep. No. 901, 102nd Cong., 2nd Sess. 41 (1992). 12/ The Board cannot

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fn. 10 (continued)
Secretary. The Secretary will facilitate this government-to-government dialogue to the extent resources are available."

The present interim guidelines reflect the same policy. See 20 BIAM Supplement 1, 2.1H(3): "Where limited resources are to be divided, however, all the tribes affected should be encouraged to meet and agree on the division of such resources."

11/ The Superintendent's decision therefore complied with the requirement that a BIA official explain the reasons for his/her decision even if that decision is based on the exercise of discretion. E.g., Kaw Nation, 24 IBIA at 20. Cf. Bowen v. American Hospital Association, 476 U.S. 610, 627 (1986) (an agency has a responsibility "to explain the rationale and factual basis for its decision, even though we [the Court] show respect for the agency's judgment in both.")

12/ Legislative history, by itself, would be of limited value here. See Lincoln v. Vigil, 113 S. Ct. at 2031:

"[A] fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does

conclude, on the basis of the statement in the tribes' testimony alone, that Congress had any specific intent regarding the manner of division of the funds among the tribes, either in general or in the event of an appropriation substantially less than the amount sought. Further, although appellant suggests that Congress intended to correct inequalities in funding among the Michigan tribes, the tribes' request to Congress stressed disparities between the funding of Michigan tribes and the funding of tribes elsewhere in the country, not disparities among the Michigan tribes themselves. It is clear that no intent to correct funding inequalities among the Michigan tribes may be attributed to Congress in this case. Appellant has not shown that an equal division of the funds would violate the intent of Congress.

[2] An appellant who challenges a discretionary decision made by a BIA official bears the burden of showing that the official did not properly exercise discretion. Ross v. Acting Muskogee Area Director, 21 IBIA 251 (1992). Appellant has failed to carry that burden here.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Minneapolis Area Director's April 30, 1993, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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fn. 12 (continued)
not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency."